United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1258

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1258

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,

—v.—

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

CELANESE CORPORATION, ET AL.,
Intervenors.

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The basic questions raised by this case are two. First, whether the Environmental Protection Agency ("EPA") may establish effluent limitations by regulation under section 301 of the Federal Water Pollution Control Act Amendments of 1972 ("Act"), 33 U.S.C. §1311. Second, whether EPA may lawfully adopt a variance clause which allows each permit granting authority to establish effluent limitations for individual dischargers which depart from the uniform limitations established under section 301.

In issue is the proper interpretation of the key provisions of the Act for controlling industrial pollution in the United States: Sections 301, 304, and 402, 33 U.S.C. §§1311, 1314, 1342. Congress devoted several years of effort to developing the Act's pollution control system which applies increasingly strict effluent limitations to individual point sources to the end "that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. §1251(a)(1). EPA, in turn, developed an administrative process for implementing these requirements, the basic results of which are the regulations disputed in this case. The challenged regulations required almost two years to develop and are the result of extensive research and analysis by independent contractors and EPA and of detailed comments by interested persons, primarily the affected industries.

In essence, Petitioner and EPA believe that the effluent limitation regulations are appropriate under the Act, and were intended by Congress in order to achieve the Act's clean water objectives. Both Petitioner and EPA conclude that Congress instructed the EPA Administrator to establish under section 301 itself, and independent of section 402, effluent limitations which are defined pursuant to the requirements of section 304. Congress directed that these effluent limitations then be applied to individual point source dischargers through permits issued under section 402. Petitioner and EPA differ only with respect to whether it is lawful under the Act for EPA to adopt a variance clause which enables individual permit authorities to depart from the uniform, minimum effluent limitations established by the regulations in setting individual permit conditions.

Of far more serious import to the establishment of the Act's goals is the contention of the intervening chemical companies which, if upheld, would seriously undermine the objectives of the Act and substantially subvert the administrative process EPA has developed for implementing the Act. The chemical companies contend that effluent limitations can be established only on a case-by-case basis under section 402 during the process of issuing a permit to each of the thousands of industrial dischargers. In this process, the permit issuer must look to regulations established under section 304 of the Act for direction. The companies argue that EPA's

regulations establishing effluent limitations must be deemed simply guidance for each permit granting authority to consider in its discretion in establishing permit conditions, thereby making each permit issuance a proceeding to establish effluent limitations based on all the factors considered under the Act. Therefore, the chemical companies assert that the EPA regulations challenged herein, which EPA promulgated pursuant to sections 301 and 304 of the Act, are valid regulations only as guidance under section 304 of the Act.

Jurisdiction of this Court is established under section 509 of the Act which gave the Courts of Appeals jurisdiction to review the promulgation of "any effluent limitation or other limitation under sections 301, 302, or 306." The chemical companies contend that effluent limitations may not be established by regulation under section 301 and thus this Court lacks jurisdiction to review the challenged regulations.

With respect to the second issue - whether EPA may lawfully adopt under the Act the variance clause challenged by Petitioner - there is essentially no agreement among the parties and amici. Each interprets the requirements of the Act and of the challenged regulations differently. The central issue here, however, is whether Congress intended to establish national, uniform, minimum standards for effluent limitations which would be applied evenly to all dischargers within a class or category of industry. Petitioner believes that

establishment of national, uniform, minimum standards of effluent limitations is central to the Act, which Congress developed after a quarter of a century of ineffective water pollution control legislation which had left the standard setting process to the individual states.

Petitioner's argument is supported by a straightforward reading of the Act. Petitioner's interpretation is corroborated by the legislative history of the Act. Here it is important to understand that the Act had a lengthy and complex history and was the subject of extensive debate. Petitioner places primary reliance on the later legislative history which was developed during the Conference and subsequent debate on the Act. This history is most relevant to the statute as enacted and therefore should be accorded great weight.

ARGUMENT

I. This Court Has Jurisdiction Over This Action Which Contests Effluent Limitations Properly Promulgated By Regulation Under Section 301 Of The Act.

Section 509(b)(1) of the Act gives the Courts of Appeals jurisdiction to review the promulgation of "any effluent limitation or other limitation under section 301, 302 or 306." Petitioner takes the position that the regulations at issue have been properly promulgated under section 301 of the Act and that the Administrator of EPA is mandated under that section to establish, by regulation, effluent limitations for classes and categories of industry which have been analyzed under the terms of section 304 of the Act. Therefore, this Court has jurisdiction.

A. The Language of the Act

The regulations in dispute in this case were proposed and promulgated pursuant to section 301 of the Act, as well as sections 304, 306, and 307. The promulgation under section 301 set the effluent limitations for existing industrial point sources, setting out the standards of best practicable technology with which the pollution dischargers must comply by July 1, 197[illegible]. This promulgating is mandated by the language of the Act. Section 301(e) states:

> "Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act." 33 U.S.C. §1311(e) (emphasis added).*

This explicit authorization is re-enforced by the more general one set out in section 501(a) of the Act:

> "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act." 33 U.S.C. §1361(a).

Many of the other sections of the Act refer to effluent limitations or standards established or required under section 301. E.g., sections 302(a), 303(d) and (e), 316(c), 401(a)(1), 401(d), 505(f), 507(d), 509(b)(1)(E).

In sum, the simple and direct language of the Act demonstrates that effluent limitations are to be established under section 301.

B. The Statutory Structure

The structure and intended operation and enforcement

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* It is this and no more that is implied by EPA Administrator Ruckleshaus when he commented on this part of the proposed Act:

> "Effluent limitations required by Section 301 would be established and applied to all point sources of discharges covered by the Act by means of the permit issued under Title IV." Legis. Hist. at 844.

of the Act demonstrate that Petitioner's interpretation of the Act is correct, contrary to the assertions of the chemical companies. In particular two provisions - sections 303(d)(1)(A) and 401(a)(1) - would be nonsensical if effluent limitations could not be established under section 301 and could be established only under section 402. The enforcement provisions of the Act - sections 309 and 505 - provide explicitly for the enforcement of effluent limitations established under section 301 itself and independent of section 402.

Absurd results are reached under the water quality provisions of section 303(d)(1)(A) if effluent limitations may not be established under section 301. Section 303 requires each state to identify "those waters within its boundaries for which the effluent limitations required by section 301 (b)(1)(A) and Section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. §1313(d)(1)(A). Water quality standards are usually defined in precise quantitative terms: "x" parts per thousand of total dissolved solids or a temperature level of "y" degrees Fahrenheit. E.g., New York State standards for class "AA" waters require that for concentration of total dissolved solids "in no case shall it exceed 500 milligrams per liter." 6 N.Y.C.R.R. §701.4. It is impossible to relate the general statutory standard of best practicable or best available technology to a water quality standard until it is given

particular meaning in terms of the discharges being considered. Thus, section 301 effluent limitations can be related to these precise values only if these limitations are themselves clearly quantified. Therefore, section 303(d)(1)(A) makes sense only if establishment of particularized section 301 standards was intended.

The water quality restrictions of sections 302 and 303 do not mention section 402, showing that section 301 effluent limitations are to be established independently of section 402.

Section 401(a)(1) requires an applicant for a federal license permitting a discharge to obtain a state certification that the applicant's proposed discharge will comply with sections 301 and 306 of the Act and further requires:

> "In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302 . . . the State shall so certify." 33 U.S.C. §1341.

This provision is utter nonsense if no effluent limitations can be established under section 301. Since the statutory standards of section 301 were fixed the day the Act was passed, certification that no applicable section 301 effluent limitation exists must mean that establishment of more particularized section 301 effluent limitations was intended.

Finally, the enforcement provisions of the Act, sections 309 and 505, assume that section 301 effluent limitations will be established independent of section 402. Under

section 309, the EPA Administrator is required to take remedial action whenever he

> "finds that any person is in violation of section 301, 302, 306, 307, or 308 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a State, ..." 33 U.S.C. §1319(a)(3)(emphasis added).

Thus, this section contemplates that section 301 effluent limitations will be developed which are independent of and enforceable apart from a permit issued under section 402.* These section 301 effluent limitations must be specific and precise, since violation of section 301 subjects a discharger to criminal penalities of a substantial nature: fines of not less than $2500 nor more than $25,000 per day of violation, or imprisonment of not more than one year, or both. 33 U.S.C. §1319(c)(1).

In discussing the requirements of section 309, the Intervenor chemists presented to the Court only those parts of the

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The civil penalty provision of section 309 makes the same distinction. 33 U.S.C. §1319(d).

statutory language which refer to violations of section 402 permits that implement the provisions of the Act, including section 301, and omit entirely from their presentation those parts which require independent enforcement of section 301 itself. Intervenors' Brief at 38-39. Petitioner does not question that violation of permit conditions leads to possible prosecution, but there can be no question that in addition to such actions, prosecution is independently available for violation of section 301 itself. Intervenors selective quotation simply hides the fact that Congress clearly expected the Administrator to establish criminally enforceable section 301 effluent limitations pursuant to section 301 itself and independent of section 402 permits.

Section 505, which governs enforcement of the Act through citizens' suits, permits one to sue "any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this Act . . . ." 33 U.S.C. §1365(a)(1). For the purposes of the section, "effluent standard or limitation" is then defined to be "an effluent limitation or other limitation under section 301 . . . or . . . a permit or condition thereof issued under Section 402 . . . . " 33 U.S.C. §1365(f)(emphasis added).

In sum, the other provisions of the Act make clear that Congress intended that section 301 effluent limitations

would be established under section 301 itself and independent of any other provision of the Act, including section 402.

C. The Legislative History

The legislative history of the Act makes clear that Congress intended that section 301 effluent limitations would be established pursuant to section 301 and independent of section 402 permits. This conclusion is demonstrated by explicit references to "effluent limitations established under section 301" as well as by discussion of "section 301 standards" and of section 301 as being the "environmental control" section, all of which are consistent only with the interpretation that enforceable effluent limitations are to be established under section 301 itself, and not only in section 402 permits.

It is important to emphasize that the legislative history demonstrates that Congress fully intended EPA to issue regulations pursuant to sections 301 and 304(b)*of the Act, just as EPA has done in this case, showing that EPA's rulemaking proceeding under section 301 is wholly consistent with the Act's requirements and that jurisdiction of this case is properly vested in this Court. Thus, Senator Bentsen, a key member of the Senate Public Works Committee, stated during

*/ Intervenors contend that the U.S. District Court decision in NRDC v. Train, 6 ERC 1033 (D.D.C. 1973) "reflects that Section 304(b) is the basis for the regulations." Intervenors' Brief at 23 (emphasis added). The case simply holds that EPA is required by section 304(b) to publish effluent limitation guidelines. EPA's authority to promulgate regulations under section 301 was not at issue.

debate on the Senate bill:

> "In phase I, for point sources of pollutants, effluent limits shall be established not later than January 1, 1976, [now July 1, 1977], which comply with specifically defined levels of effluent control and treatment. As defined in section 301(b)(1) of the bill, and as elaborated in the regulations which we anticipate the Administrator shall issue pursuant to section 301 and section 304, these 1976 [now 1977] goals shall be at least . . . the 'best practicable control technology currently available' for [industrial] point sources . . . ." Legis. Hist. at 1283 (emphasis added).

With respect to EPA's authority to establish effluent limitations pursuant to section 301, the House Report on the bill in discussing the Administrator's authority under section 302 to change or modify section 301 effluent limitations states:

> "Proposed effluent limitations under section 302 shall in no case operate to delay the application of any effluent limitation established under section 301." H.R. Rep. No. 92-911, Legis. Hist. at 791 (emphasis added).

Similarly, the legislative history regarding the state certification provision of the Act, section 401, shows that Congress intended section 301 to have independent status and effect. During Senate debate on the original Senate bill, Senator Muskie explained the scope of section 401 and said:

> "This section . . . requires that any applicant for a Federal license or permit provide the licensing agency with a certification

> from the State in which the discharge occurs that any such discharge will comply with section 301 and 302, which are the environmental control sections." Legis. Hist. at 1388 (emphasis added).

The legislative history of the two major enforcement provisions of the Act, sections 309 and 505, repeatedly underscores the independent status of section 301 requirements, violation of which is subject to both criminal and civil liability. Thus, the Senate Report on the bill states:

> "When EPA finds anyone violating Sections 301, 302, 306, 307, 308, or 402, the agency must either issue an order that requires immediate compliance or bring a civil suit . . . . Anyone willfully or negligently violating a Section 402 permit or any of several other specific sections of the bill shall be liable to a fine of up to $25,000 per day of violation and one year in jail. For a willful or negligent violation of Sections 301, 302, 306, 307, or 402, the fine shall be not less than $2,500 per day." S. Rep. No. 92-414, Legis. Hist. at 1481.

Regarding the citizen suit enforcement provision, section 505, the Senate Report states:

> "Authority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act . . . . Citizens are granted authority to bring enforcement actions for violations of schedules or timetables of compliance and effluent limitations under section 301, . . . and any condition of any permit issued under section 402." S. Rep. No. 92-414, Legis. Hist. at 1500.

In sum, the legislative history fully supports the con-

clusion based on the plain language and structure of the Act that section 301 effluent limitations are to be established and enforced, by means of criminal and civil penalties, independent of any other section of the Act, including section 402.

EPA acted in compliance with the Act's requirements in promulgating regulations establishing the section 301 effluent limitations which have been challenged in this case. Section 509 of the Act grants this Court jurisdiction to review actions of the Administrator under section 301. The petition for review is properly before the court and it should be treated on its merits.

II. The Rulemaking Procedure Is Appropriate To The Setting Of Effluent Limitations Under Section 301 And The Variance Clause Departing From This Procedure Should Be Set Aside.

Prominent among the Congressional policies which guide the administration of the Federal Water Pollution Control Act is the establishment of a national, uniform system of technological controls for polluting dischargers on the timetable set out in section 301. The rulemaking procedure under section 301 assures the uniformity of treatment that is central to a national water pollution control law. The process of careful classification of industry into subclasses and categories is part of this procedure mandated by the Act and essential to achieve the fine-tuning which will reflect actual differences in the industrial methods of discharge which are to be controlled.

The regulations at issue in this case establish effluent limitations based on the best practicable technology for existing industrial water pollution sources. Thus, EPA is dealing with known facts - the contents of actual discharges and the practical methods now at hand to reduce such discharges. The setting of effluent limitations must, in these circumstances, be both uniform and precise. In light of the history of the Act, it would be inappropriate and improper to allow EPA to open a road to the dilution of its standards through the gate of the variance clause.

A. The Policies of the Act

The Federal Water Pollution Control Act Amendments of 1972 culminates 26 years of effort by the Congress "to bring to reality an effective properly funded program to restore and enhance the quality of our waters and to insure their future as a lasting national asset." H. R. Rep. No. 92-911, Legis. Hist. at 753. Congress recognized that a basic problem with prior legislation was that uniform, national, mandatory water pollution control standards had not been established. As a result, industries could shop among local jurisdictions for those whoch for reasons of economic development, local dependence on a dominant industry, or lack of concern for the effects of pollution would grant the industry permission to discharge pollutants to the nation's waters at rates exceeding the national standard. Therefore, Congress repeatedly emphasized in the legislative history the importance of establishing national uniform effluent limitation standards.

National uniformity was the first consideration which Senator Muskie, principal author of the Act, laid before the Senate during its final debate on the bill:

> "Senators will recall from the November debate on the Senate bill that there were three essential elements to it: Uniformity, finality, and enforceability. Without these elements a new

> law would not constitute any improvement on the old; we would not bring a conference agreement to the floor without them.
>
> As far as uniformity and finality are concerned, the conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977. This does not mean that the Administrator cannot require compliance by an earlier date; it means that these limitations must be achieved no later than July 1, 1977, that they must be uniform, and that they will be final upon the issuance of a permit under section 402 of the bill." Legis. Hist. at 162.

This uniformity was, of course, directly related to the aim of preventing industries from "forum shopping" among the States. Senator Muskie put it bluntly in the debate on the Senate bill:

> "[U]nless there is uniformity of regulation, polluters will seek to escape stringent requirements of one area, and they will go to other areas where there are less stringent requirements." Legis. Hist. at 1405.

Uniformity is closely connected to another legislative consideration. Congress sought to have EPA establish precise and defensible standards so that effective enforcement would be possible by reference to quantified requirements rather than to vague, narrative goals. As Senator Randolph, Chairman of the Senate Committee on Public Works, stated:

> ". . . I stress very strongly that Congress has become very specific on the steps it wants taken with regard to environmental protection.

> We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives for administrators to follow . . . .
>
> In the past, too many of our environmental laws have contained vague generalities. What we are attempting to do now is provide laws that can be administered with certainty and precision. I think that is what the American people expect that we do." Legis. Hist. at 1272.

The uniform and quantified standards are set out through the regulations promulgated under sections 301 and 304 of the Act with the section 304 analysis working to define the effluent limitations promulgated under section 301.

The emphasis on national uniformity is particularly clear at the end of the Congressional process of debating and commenting on the Act. The various amici have searched the legislative history and offered comments from individual Congressmen in the various debates suggesting that the requirements of the Act should be established on the most individual basis possible - by the separate states in the setting of specific permit terms.* But consideration of the prepared

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* Full reading of the passages cited by some of the industrial groups dispells the emphasis on state administration which they seek to create. For instance, the Chamber of Commerce quotes Congressman Blatnik on this point at p. 23 of its brief. The Congressman continued on from the cited quotation to say:

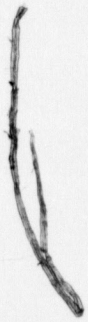
> Also, and I emphasize this, let there be no question in your minds, this bill requires that State and regional programs follow stringent Federal guidelines. It will not allow the industrial equivalent of forum shopping. Legis. Hist. at 355-56.

commentaries on the Act, particularly those on the final version which passed the Congress, underscored and emphasized the national, uniform nature of the Act.

In discussing section 301, the Conference Report on the bill makes it clear that plant-by-plant definition of the standards of the Act is not intended:

> "The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination." S. Rep. No. 92-1236 (Conf. Rep.), Legis. Hist. at 304.

"Uniformity" was the basic rationale for establishing section 301 effluent limitations for specific classes and categories of point sources, as was emphasized by Senator Muskie, in discussing the changes to section 304 which were made in Conference:



> "The modification of subsection 304(b)(1) is intended to clarify what is meant by the term 'practicable.' The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources.
>
> The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of

> point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community." Legis. Hist. at 170.

There can be no question that among the basic policies of Congress in passing the Act was the aim of establishing a uniform national system of pollution control with precise standards for industrial dischargers that would be effective for administration and enforcement.

B. The Use of Classes and Categories of Industry Provides Appropriate Flexibility to the System.

Intervenors and various amici have attempted to characterize the policy of clearly stated, uniform standards as mechanical and rigid and passing beyond the Congressional mandate. This is not the case.

The method of analysis and rule-making sanctioned by Congress has built into it the degree of flexibility which allows proper account to be taken of differences in the nature of industrial processes and discharges without the loss of the national uniformity which the Congress sought to achieve. Section 304, by which the effluent limitations of section 301 are to be defined, speaks of an analysis undertaken in terms of classes and categories of point sources. The Administrator of EPA is to

> . . . identify, in terms of amounts of constituents and chemical, physical and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources . . . . ." 33 U.S.C. §1314(b)(1)(A). (emphasis added).

It is this analysis under section 304 which defines the standards of section 301.

The careful definition of the classes and categories of industry, based on the extensive development documents and public comment available to EPA, allows the fine-tuning which is appropriate to establishing the distinctions between different dischargers.

Senator Muskie's detailed prepared statement on the Conference Report emphasizes this point in the discussion of the section 304 analysis on which the 301 effluent limitations rest:

> "The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class." Legis. Hist. at 172.

There is no indication here that exceptions are to be made to the policy of standards set by class and category of industry. When Congress wished to establish such exceptions,

it was fully capable of expressing them explicitly. Thus, section 301(c) of the Act provides an exception to the 1983 best available technology standard where an owner or operator can show certain specified economic impacts. The Conference Report emphasizes that these exceptions are only to come after 1977 and that in establishing the 1977 best practicable limitations, the standards are to be by class and category of industry.

> "The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable." S. Rep. No. 92-1236; Legis. Hist. at 304.

This point was reiterated by Senator Muskie in his prepared analysis of the final bill as it emerged from Conference:

> "Except as provided for in section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." Legis. Hist. at 172.

Appropriate flexibility is to be found within the system of analysis by classes and categories of industry.

C. The Variance Clause Violates the Policies of The Act and The System of Analysis by Classes and Categories of Industry and Must Be Set Aside.

The system of rulemaking by finely drawn categories of industry preserves the uniformity sought by Congress while being congruous with the differences present in actual industrial operation. The variance clause imposed by EPA opens the door to the destruction of the uniform system of clearly established standards which Congress sought and must be set aside.

The situation of this case is quite unlike that in which the ICC imposes general rules governing the movement of freight cars on each of the hundreds of railroads in the country. United States v. Allegheny-Ludlum Steep Corp., 406 U.S. 742 (1972). The analysis here has been of a much more fine-grained sort. Nor does the variance clause seek to account for generic problems such as those of start-up and shutdown which led to variations from the set rules described in Portland Cement Ass. v. Ruckleshaus, 486 F.2d 375 (D.C. Cir. 1973) and Essex Chemical Corp. v. Ruckleshaus, 486 F.2d 427 (D.C. Cir. 1973).

The situation in the present case is one in which EPA is engaged in analyzing known manufacturing methods and known technologies across many categories of industry each containing a limited number of dischargers. EPA's rulemaking does not face real unknowns. The agency's rulemaking must be based

on adequate data or the rulemaking should be done again. Portland Cement, supra, at 393.

Most importantly, the possibility of variance from established regulations must be measured against the policies of the Act. National Broadcasting Co. v. U.S., 319 U.S. 190, 225 (1943). Variances from regulations are proper only where the regulation varies from the statute, since the statute must always control. Here the policies of uniformity and clear, quantitatively set effluent limitations stand directly counter to the scheme of allowing variances. The variance clause cannot fulfill the policies of the statute.

The failure of EPA to follow the intent of Congress is most obvious in the broad scope which it gives to the variance clause. It lists the factors on which information was collected and developed: age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs. E.g., 40 C.F.R. §412.22, Feedlots Point Source Category, 39 Fed. Reg. 5708, App. at 22. Variances may be sought on the basis of differences in any of these factors. Id. It is obvious that these factors include elements which are part of the economic impact of the effluent limitation; "costs" is the utterly undebatable case. In fact, it is hard to determine which of the factors listed would not be a contributor to the economic impact. The Conference Report is bluntly explicit

in directing EPA to consider such impacts only within classes and categories of industry:

> "The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination." S. Rep. No. 92-1236; Legis. Hist. at 304.

EPA has not even made the effort to comply with this directive of the Congress or to show how factors other than economics could be used as the basis of a variance.

The variance clause included by EPA in the challenged regulations allows reconsideration of the effluent limitations on any and all of the factors analyzed by the agency. The clause passes beyond the terms of the statute and the mandate of Congress and must be set aside.

CONCLUSION

The Court should sustain its jurisdiction over this petition and set aside the variance clause in each contested regulation as unlawful.

Respectfully submitted,

Angus Macbeth
Edward L. Strohbehn, Jr.

Attorneys for Petitioner

AFFIDAVIT OF SERVICE BY MAIL

State of New York

County of Kings

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn, XXX. Ave Brooklyn, N.Y.

That on the 13th day of September, 1974, deponent served the within Reply Brief for Petitioner upon Raymond W. Mushal, Department of Justice, Washington, D.C.

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Max N. Edwards, Collier, Shannon, Rill & Edwards; 1666 K Street, N.W., Washington, D.C.

Milton A. Smith, Chamber of Commerce of the U.S.A., 1615 H. Street, Washington, D.C.

Attorney(s) for the _____ in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 13th day of September 1974

William A. McKaigney

WILLIAM A. McKAIGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976